MOHD RIZAL MAT YUSUF A

v.

PP

HIGH COURT MALAYA, SHAH ALAM B
NALLINI PATHMANATHAN J
[CRIMINAL APPEAL NO: 42-2-2005]
22 DECEMBER 2008

CRIMINAL LAW: *Penal Code - Section 292(a) - Making and distribution of obscene video compact disc - Appeal against conviction and sentence - Whether s. 292(a) applicable - Definition of "obscene object" - Whether prima facie case made out - Evaluation of defence's case - Whether miscarriage of justice occasioned* C

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether established - Whether requisite elements of offence made out - Maximum evaluation of evidence - Failure to comply with fundamental requirement - Penal Code, s. 292(a)* D

EVIDENCE: *Burden of proof - Prima facie case - Whether established - Prosecution's case - Maximum evaluation of evidence - Penal Code, s. 292(a)* E

EVIDENCE: *Burden of proof - Prosecution's burden - Thorough examination and evaluation of prosecution's case - Whether carried out - Reversal of burden of proof - Application to defence of accused - Whether a substantive flaw - Penal Code, s. 292(a)* F

EVIDENCE: *Burden of proof - Defence raised by appellant - Comprehensive review of defence instead of prosecution's case - Reversal of burden of proof - Whether a substantive flaw - Penal Code, s. 292(a)* G

CRIMINAL PROCEDURE: *Defence - Calling for defence of accused - Whether must first make out offence to high degree of certainty - Burden of proof - Prima facie case - Penal Code, s. 292(a)* H

CRIMINAL PROCEDURE: *Defence - Explanation by accused - Whether raised credible or reasonable doubt on prosecution's case - Failure by trial judge to consider accused's evidence and explanation - Error in law*

WORDS & PHRASES: *"obscene object" - Penal Code, s. 292(a) - Definition of - Whether video compact discs fell within definition* I

This was an appeal by the appellant ('Rizal') against the decision of the Sessions Court finding him guilty of making and distributing an obscene video compact disc ('subject VCD') in contravention of s. 292(a) of the Penal Code ('Code'), and his consequent sentence of 18 months' imprisonment. The subject VCD contained scenes of sexual activities between Rizal and a fellow air stewardess ('SP1'), Rizal and other females including his wife and several other scenes depicting sexual acts between unknown parties. Rizal admitted that he was the male actor in several specific scenes with his wife, SP1 and two unknown girls, which he had recorded for his own viewing. He, however, had recorded those scenes on video cassette tapes and not a video compact disc, which cassette tapes Rizal claimed were lost during the course of him and his wife moving from their rented premises to his in-laws' house. The Sessions Court judge found this defence to be implausible and convicted him accordingly. The following grounds were raised by the appellant: (i) s. 292(a) of the Code was not applicable in this case since video compact discs or film material of any nature did not fall within the definition of an "obscene object" in that section. It was further averred that the offence would properly fall within the purview of s. 5 of the Film Censorship Act 2002 ('FCA'); (ii) a *prima facie* case had not been made out to support the charge under s. 292(a) of the Code; and (iii) the judge had failed to correctly evaluate the defence's case.

Held (allowing the appeal):

(1) There is nothing in s. 292(a) of the Act which warrants such a specific and express restriction being imposed on the words "or any other object whatsoever". Those words, particularly the word "whatsoever" signifies that the word "object" is to be construed widely and to include all manner and variety of objects that are obscene. Thus, the words "any object whatsoever" are sufficiently wide to include visual recordings such as are contained in a video compact disc. As for the contention that the FCA exists specifically to cater for films of an obscene or lewd nature, it does not follow irrefutably that prosecution under s. 292(a) of the Code is thereby precluded. The Code is a general statute while the FCA makes more specific provisions for films, and the fact that it provides for obscene films does not mean that the Code does not. The prosecution was thus properly brought under s. 292(a) of the Code. (paras 11, 14 & 15)

(2) From the facts, it was evident that salient parts of the charge, comprising several integral elements, namely, that Rizal made or produced the subject VCD for the purposes of distribution to the public had not been made out. The judge in her judgment did not appear to have appraised the evidence with a view to establishing whether or not the requisite elements of the offence were made out. Having set out SP1's evidence and the fact that the subject VCD (and copies thereof) were available for purchase in the market, it was concluded that a *prima facie* case had been established. It did not appear from the grounds of judgment that the evidence adduced by the prosecution was subjected to a maximum evaluation as was required by law. In the instant case, the failure to subject the evidence to a thorough evaluation took the form of failing to assess or ascertain that all the ingredients of an offence under s. 292(a) of the Code were made out on the evidence adduced during the prosecution's case. As this was not done, the conclusion that a *prima facie* case was made out was flawed. The failure to comply with this fundamental requirement had occasioned a miscarriage of justice. (para 48)

(3) The grounds of judgment showed that while a thorough examination and evaluation of the prosecution's case was not carried out, a thorough and comprehensive review was instead conducted on the defence. This was a reversal of the burden of proof, which amounted to a substantive flaw resulting in a miscarriage of justice. The requirement in law that a maximum evaluation be carried out at the close of the prosecution's case is not mere incantation but requires rigorous application. It cannot be achieved by calling for the defence at the close of the prosecution's case without having first ascertained that the offence has in fact been fully made out to a high degree of certainty, such that, the court would have no hesitation in convicting the accused at the close of the defence's case should he choose to remain silent. (para 49)

(4) There was no indication that the judge considered whether or not the evidence and explanation given by Rizal in respect of his defence raised a credible or reasonable doubt on the prosecution's case. The failure to do so amounted to an error in law. Further, an objective evaluation of the defence showed that it did raise a "credible doubt" on the prosecution's case because it was entirely plausible that the subject video cassette tapes were lost during the course of the move from

A Rizal's rented premises, and that the contents of those two cassette tapes were edited and further material was added to it to comprise the subject matter of the obscene subject VCD that was sold to the public in 2003. (para 51)

B **(5)** In this instance, the basic ingredients of an offence under s. 292(a) of the Code were not made out. The prosecution's witnesses themselves failed to draw a link between the subject VCD and Rizal. In the circumstances of the case, the finding of guilt and the conviction of the accused by the judge were C wrong. (para 52)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Lim Hock Thai v. PP [1980] 1 LNS 97 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
D *Mat v. PP [1963] 1 LNS 82* ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Tee Tean Siong & Ors [1963] 1 LNS 99 ***(refd)***
Prim CT AIR [1961] 1 Cri LJ 371 (Cal) ***(refd)***
E *Raj Kapoor v. Laxman [1980] SC 175* ***(refd)***
Rosaiah B [1991] Cri LJ 189 (AP) ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 106, 114(g)
Film Censorship Act 2002, s. 5
F Penal Code, s. 292(a)

Penal Code 1925 [Ind], s. 292(2)(a)

For the appellant - Rakhbir Singh; M/s Rakhbir Singh & Co
For the respondent - Md Azar Irwan Md Ismail DPP; AG's Chambers

G *Reported by Suresh Nathan*

JUDGMENT

H **Nallini Pathmanathan J:**

[1] On 17 December 2004 Mohd. Rizal bin Mat Yusof ('Rizal') was found guilty of making and distributing an obscene video compact disc ('VCD') in contravention of s. 292(a) of the Penal Code. As a consequence, he was sentenced to eighteen months I imprisonment in the Sessions Court. He appeals against this decision.

[2] At the outset of the case in the Sessions Court, three charges were preferred against Rizal. However at the close of the prosecution case, the learned Sessions Court judge decided that the prosecution had only made out a *prima facie* case in respect of the first alternative charge preferred against him. The first alternative charge reads as follows on translation into English:

> That you, between the year 1999 until May 2003, at No. 12, Jalan Sri Banang, Taman Sri Andalas, Klang, Selangor Darul Ehsan did make one video compact disc that contains obscene sex scenes with the purpose of distributing/circulating the said VCD to the public and as such you have committed an offence under section 292(a) of the Penal Code which is punishable under the same section.

[3] Section 292(a) of the Penal Code in turn reads as follows:

> **Whoever:**
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or **for the purposes of** sale, hire, **distribution,** public exhibition or **circulation makes, produces** or has in his possession any obscene book, pamphlet, paper, drawing, painting representation or figure or **any other obscene object whatsoever;** ...
>
> (b) ....
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> **Shall be punished with imprisonment for a term which may extend to three years, or with fine or with both.** (emphasis added).

Preliminary Issue

[4] At the outset of the appeal, learned counsel for Rizal, Mr. Rakhbir Singh who appeared in the court below, raised a point of law that had not been raised in the Sessions Court. He contended that s. 292(a) of the Penal Code was not applicable in this case, in that video compact discs or film material of any nature did not fall within the definition of an 'obscene object' in s. 292(a) of the Penal Code. The offence, it was contended, would properly fall within the purview of s. 5 of the Film Censorship Act 2002, but this Act only came into force in

February 2002, while the facts of the instant case and the charges against Rizal were made in 1999. The predecessor to the Film Censorship Act 2002, namely the Cinematograph Films (Censorship) Act 1952 (revised 1971) which was in force in 1999, did not have a section corresponding to s. 5 of the Film Censorship Act 2002, merely providing that 'possession' of an obscene film would amount to an offence. To that extent it was submitted, there was no offence committed by Rizal, as the making or production of an obscene film or video cassette recording did not fall within the purview of s. 292(a) or any of the provisions of the Cinematograph Films (Censorship) Act 1952.

[5] In support of the contention that a video compact disc carrying the film in question would not fall within the definition of 'any object whatsoever' in s. 292 of the Penal Code, learned counsel for Rizal cited *Lim Hock Thai v. Public Prosecutor* [1980] 1 LNS 97, a decision of the High Court of Brunei, which in turn made reference to the Malaysian case of *Public Prosecutor v. Tee Tean Siong & 8 Ors.* [1963] 1 LNS 99. In the latter case, nine persons who attended the screening of an obscene film were arrested as they were trying to escape when the police raided the premises. They were convicted by the Magistrate of committing an offence under s. 292(a). Harun Hashim J, quashed the decision of the Magistrate on revision, holding that the mere attendance at a screening of an obscene film could not amount to a contravention of s. 292(a). In the course of his judgment His Lordship had occasion to comment on s. 292(a) of the Penal Code:

> Section 292 of the Penal Code deals with matters contained in the Obscene Publications Act. Whether a film can be included in the term "Publication" as normally understood is another aspect to be considered. The Control of Imported Publications now defines "publication" to include "any visible representation, any recording ... of any cinematograph film ..." But the definition of the same word in the Undesirable Publications Ordinance, 1949 would appear to be narrower and limited to what is generally understood to fall within the term "publication", namely printed or written matter. If there is no offence then under the Penal Code is there an offence under any other law?
>
> Section 24, Cinematograph Ordinance (No. 76 of 1952) can clearly be invoked and with far less onus on the prosecution (other than proof of possession) – for the obscenity or lewdness of the film will easily be satisfied by screening it to the Court – and it will be noted that it provides for a fine not exceeding $1000, or imprisonment not exceeding six months or both as

> compared with section 292 of the Penal Code where punishment is imprisonment not exceeding three months or fine or both. The exhibitor has sufficient possession to be caught under this section, as well as a person in mere possession. Destruction or disposal will, however, require the direction of the Minister ...
>
> ... In my view, therefore, 'blue films' should not be charged under section 292(a) or section 109 and section 292(a) but under section 24 of Ordinance No. 76 of 1952 ...

[6] Section 292(a) was clearly inapplicable in the foregoing case, where the nine men who were arrested and charged under the section were mere spectators of the obscene film. However Harun Hashim J went further to state that s. 292(a) did not extend to film material or 'blue films' as he called them, but was restricted to printed or written matter, on the premise that the section deals only with matters contained in the Obscene Publications Act. Accordingly, he decided, it was not clear that 'publications' in that context included film material.

[7] This view was adopted in *Lim Hock Thai v. Public Prosecutor* (above) where the facts were that Lim, the appellant, was charged with the possession of obscene video cassette tapes for the purpose of hire. Following upon and adopting what was said by Harun Hashim in *Public Prosecutor v. Tee Tean Siong & 8 Ors.* (above) Zimmern J held that if the publication of obscene films should not be charged under s. 292(a) of the Penal Code, then neither should video tapes fall within the purview of the section, particularly as "... for a film at least can be seen against lighting but a video tape is opaque ...".

[8] Earlier on in his judgment the learned judge examined what was meant by the words 'or any other obscene object whatsoever'. He determined that those words could not apply to a video cassette tape for the following reasons:

> ... The section prohibits publication of any obscene book, pamphlet, paper, drawing, painting, representation, or figure or any other obscene object whatsoever. It is clear that all particular items set out are objects in themselves otherwise the word "other" would not appear in the general words. The words "object" means in this context a material thing and the attribute of the material thing is that it has to be obscene by reason of the governing adjective. The material things or object complained of was a video cassette tape ...

[9] The Magistrate had concluded that the video tape cassette in issue was obscene and that it therefore fell within the purview of the words 'any other obscene object' whatsoever. The learned judge however disagreed with this decision stating as follows:

> ... With respect I cannot agree with him. What he saw which was obscene was not the tape but the picture on a T.V. screen reproduced by means of inserting the tape on to a video tape recorder connected to a T.V. set. In my view the words of the section are so plain that no aid to construction is required. Under the section for an object to be obscene it has to be so to the very sight or upon reading. If it were otherwise such as in the case of a video tape then every author, artist sculptor capable of writing or producing an obscene book, drawing of figure is also an obscene object. I am unable to strain the language of the section to meet the justice of this case. In taking this view I am fortified by the judgment of Hashim J in *Public Prosecutor v. Tee Tean Siong & Ors. (supra)* ...

[10] What then is the position in law? Can it be said on the basis of the two cases above that the words 'or any other object whatsoever' in s. 292(a) does not cover video compact discs which store visual images and reproduce them when they are played?

[11] Section 292(a) of the Penal Code is in *pari materia* with s. 292(2)(a) of the Indian Penal Code. The section therefore takes root from the equivalent section in the Indian Penal Code. This section was inserted in the Indian Penal Code in 1925 and was introduced into the Indian Penal Code by the Obscene Publications Act 1925 to give effect to Article 1 of the International Convention for the Suppression of Circulation of Traffic In Obscene Publications, (see Ratanlal Vol. I, Chapter XIV). From the foregoing it is evident that the object of the provision was to stop the circulation and traffic in obscene literature. Are the words 'or any other object whatsoever' then to be restricted to publications only, such that films or visual recordings of an obscene nature are not caught by this provision of the Code? At the time of the insertion of this section in the Indian Penal Code, and its introduction in our Penal Code, video compact discs were not in existence. Does it therefore follow that the section has to be read restrictively so as to encompass only objects or items which would fall within the purview of a 'publication'?

To my mind there is nothing in the section which warrants such a specific and express restriction being imposed on the words 'or any other object whatsoever'. Those words, particularly the word 'whatsoever' signifies that the word 'object' is to be construed widely and to include all manner and variety of objects that are obscene.

[12] In any event, films and visual recordings are not exempt from this section in India. In *Raj Kapoor v. Laxman* [1980] SC 175 the Supreme Court of India considered the complaint lodged against, *inter alia*, the distributor of a film under s. 292(a) of the Indian Penal Code. The film had in fact, prior to this, been approved by the Central Board of Film Censors under the Indian Cinematograph Act. Despite this, a prosecution was brought under s. 292(a) of the Indian Penal Code, on the basis that it was obscene. The Supreme Court eventually quashed the prosecution on the grounds that it had been certified by the official film censorship body and could therefore be viewed and distributed to the public at large. In other words it was determined that the film was not obscene.

[13] However in reaching this finding the court made it clear that the mere fact that the censorship board had approved a film did not mean that it could not violate s. 292(a). In so concluding it is evident that the Supreme Court in India considered that 'films' and visual recordings would fall within the definition of 'any object whatsoever' in s. 292(a) of the Penal Code. (See also *Rosaiah B* [1991] Cri LJ 189 (AP) where a spectator of blue films could not be prosecuted for abetting the main offence under this section because it could not be established that he had intentionally exhibited or arranged for exhibition of the film; and *Prim CT* AIR [1961] 1 Cri LJ 371 (Cal) where there was no offence under this section by a person viewing an obscene film on television using a Video Cassette Recorder because the visual recording was not for sale, hire, public exhibition or circulation. In both these cases, the visual recordings clearly fell within the definition of 'any object whatsoever'.)

[14] For these reasons, it appears to me that the words 'any object whatsoever' is sufficiently wide to include visual recordings such as are contained in a video compact disc. I refer to the Brunei case of *Lim Hock Thai v. Public Prosecutor* (above) where the learned judge held that the object has to be 'obscene' to the very sight or upon reading and that therefore a video cassette

recording which could only be viewed after it had been played and transmitted onto a television screen could not be described as an obscene object on sight. With the greatest of respect, I am unable to adopt the reasoning in that case, as any book, or pamphlet that is produced for circulation, may not on sight appear to be obscene, yet could amount to a contravention of the section. This occurs when a mere portion of the book or publication is obscene. Therefore the book or publication may not, on sight appear to be obscene. This will only become apparent if it is read in full. Similarly a video cassette recording or a video compact disc may not appear on the face of it to be obscene but its contents, evident upon playing, may well reveal obscene content. Just as a book has to be read in order to ascertain its content, so too has a visual recording to be played in order for it to be seen, so as to ascertain its content. The fact that it has to be played on another object does not make the video cassette recording or video compact disc any less an object. It is simply required that the object in question containing the visual recording has to be played on another object in order for its content to be visible. In short can it be reasonably argued that a video compact disc with obscene visual recordings on it is not an obscene object, even when it is played? Or does the fact that it has to be played in order to be perceived, remove it from the category of 'obscene objects'? In both cases, the answer is no. For these reasons, it appears to me that the words 'any other object whatsoever' encompasses video compact discs.

[15] As for the contention that the Film Censorship Act 2002 exists specifically to cater for films of an obscene or lewd nature, it does not follow irrefutably that prosecution under the Penal Code under the provisions of s. 292(a) is thereby precluded. The Penal Code is a general statute while the Film Censorship Act 2002 is a makes more specific provision for films. The fact that it provides for obscene films does not mean that the Penal Code does not. This preliminary point is therefore determined in favour of the respondent, the prosecution. The prosecution is properly brought under s. 292(a) of the Penal Code.

The Salient Facts

[16] In 1999 Rizal was an air steward or flight attendant with Malaysian Airlines System ('MAS') who worked *inter alia*, on international flights. It is not in dispute that in 1999 he had a sexual relationship with SP1 who was a fellow air stewardess. It

is also not in dispute that Rizal recorded visual images of SP1 at various times in different places, including their sexual activities, on more than one occasion, in Brisbane and at his home at Jalan Andalas. At all times Rizal used his own video camera and SP1 consented to such recordings. SP1 was wearing her MAS uniform during some of these recordings. When SP1 questioned Rizal as to the reason for such recordings, he told her that they were for his own viewing and that the film/visual recording would be destroyed after it had been viewed. The relationship between SP1 and Rizal eventually ended when SP1 learned that Rizal was married. She asked him whether the tape recording of their sexual activities had been destroyed, at which point Rizal threw a tape onto the floor. At this point, SP1 stormed out and therefore never had the occasion to ascertain whether the tape had in fact been destroyed or even if the tape that had been thrown on the floor was the relevant tape. SP1 however testified that she understood that the tape was not meant to get into any third party's hands and that Rizal had said that he would destroy it.

[17] In or around March or April 2003, SP1 was called up by the management personnel at MAS who informed her that compromising pictures of her were available on the Internet. Several weeks later, SP1 was informed by MAS that recordings of her sexual activities on a video compact disc were available in the local market. These recordings were the recordings that Rizal had earlier made as described above.

[18] The video compact disc referred to which has given rise to this prosecution against Rizal did not only contain recordings of his acts with SP1. Additionally there are visual recordings and images of Rizal with other females including his wife. By his own admission Rizal admits that he personally recorded on a video cassette tape, scenes from a trip to Brisbane, the MAS Academy and at his home with SP1. He labeled this video cassette tape 'Brisbane'. He also recorded, with his wife, sex scenes in a hotel in Narita, Japan and at home, and with two other females in a friend's apartment, which he labeled 'Wife'. It was never in dispute that Rizal had personally recorded these scenes, using a video camera. Rizal did not record these visual images on a video compact disc but a video cassette tape.

[19] However the VCD or video compact disc which is the subject matter of this prosecution contains, in addition to the scenes above, several other scenes depicting sexual acts between

A unknown parties. There are up to five unidentified or unknown parties who appear on the visual recording in the VCD or video compact disc. They have no connection with Rizal. The video compact disc is entitled 'Kehidupan Seorang Pramugara Yang Terlampau' and has a cover with a picture depicted on it.

B

[20] One Loh Kim Fatt, SP6 gave evidence that he was selling VCDs in April 2003, when his business premises were raided by the police. They found that he was selling obscene VCDs including the one entitled 'Kehidupan Seorang Pramugara Yang C Terlampau' that is the subject matter of prosecution in the instant case SP6 testified that he had obtained the subject VCD entitled 'Kehidupan Seorang Pramugara Yang Terlampau' from a Chinese man called 'Gemuk'. There was no further identification nor was 'Gemuk' called to testify.

D

[21] Detective Superintendant Mohd. Noor bin Ahmad, SP11, is an analyst in the Audio Video and Photograph Department of the Forensic Division of the Polis DiRaja Malaysia in Cheras, Selangor. He testified that upon analysis, the VCD in issue was from one or more video cassette tapes. It was probable that the visual E recordings in the VCD had been edited because there were sequences of pictures that appeared at an early stage of the recordings and which then appeared again subsequently near the end of the recording. This indicated that it had been edited.

F **[22]** More significantly, SP11 also explained that in order for the images recorded on a video cassette recorder to be transferred to a video compact disc or a VCD, the process involved transferring the image to a computer, saving it in a programme, editing it if necessary and then from that programme, transferring it to a video G compact disc using a Compact Disc writer or CD writer as it is commonly called, to 'burn' the image onto the VCD. The equipment required in order to effect this process includes a computer, CD writer and specific connection/connecting cables. It is not in dispute that in the instant case, no such equipment was H produced in evidence.

[23] The Investigating Officer, Assistant Superintendant Muniandy a/l Ramasamy, SP13 stated in evidence that the VCD in issue was not made by Rizal and that the video cassette recordings on I which parts of the VDC was based were also not in Rizal's possession.

[24] The foregoing are the salient facts in relation to the prosecution case. On, *inter alia* the above facts, the learned Sessions Court concluded that the prosecution had established a *prima facie* case, and went on to call the accused to make his defence against the charge preferred against him.

The Defence

[25] Rizal in his defence explained that when he was working as a flight steward for MAS in 1999, he often took along a video handy camera and the requisite film for the camera namely video tape cassettes, on his flights for his personal use. There was no prohibition against this in his rules of employment.

[26] Rizal also admitted that he was the actor in scenes on the film with SP1. He explained that in 1999 he had a relationship with SP1. His wife, SD2 discovered this fact when she watched the recording of SP1 and Rizal. She delivered an ultimatum to Rizal who broke off his relationship with SP1, during the course of which SP1 asked him what he had done with the recording of the two of them. He then threw the video cassette tape containing those scenes onto the floor in front of her, promising to destroy it. SP1 left without the tape.

[27] Rizal however, did not destroy the tape as promised but hid it. He placed it into an old empty video cassette cover and placed it in one of the guest rooms on the first floor of his house in Sri Banang, Klang. It was stacked with about thirty or forty other old tapes. This happened in September 1999. In October he and his family left these premises in Sri Banang, Klang which he had rented, and moved back to his mother-in-law's house in Jalan Sri Siantan 49, Taman Sri Andalas, Klang.

[28] Rizal's wife, SD2 was the one who carried out the shifting from the rented premises in Sri Banang, Klang to Jalan Sri Siantan 49, Taman Sri Andalas, Klang. Rizal was away flying. When he returned to his mother-in-law's house, he searched for his old video cassettes, particularly the one of him and SP1, and a second one of himself and his wife, but could not find any of these cassette recordings. Rizal was unwilling to question his wife, SD2 as to the whereabouts of these two cassette recordings that he had individually labeled 'Brisbane' and 'Wife' as he was concerned that it would cause a serious argument between his wife and himself. He testified that he thought at the time that his wife had probably found the tapes and destroyed them. So he simply said nothing.

[29] Rizal was clear that at no time did he transfer the contents of the video tape recording in cassette form onto a video compact disc, which comprises the subject matter of the charge. He further explained that he did not have the equipment to do so, and did not know how the cassette recording appeared in video compact disc form. However he was able to point out that the final film appearing on the video compact disc comprised not only the recordings made by him, and which he had participated in together with SP1, his wife, SD2 and two unknown girls, but had several other pornographic scenes/recordings involving persons unknown to him.

[30] Several of the scenes involving Rizal and his wife, and Rizal and SP1 had been edited. These scenes had also been repeated and some of the scenes appeared in the video compact disc recording in reverse order. In short, while he admitted that he was the male actor in several specific scenes with his wife, SD2, SP1 and the two unknown girls which were on the video compact disc recording, he had no knowledge of the other participants appearing in all other scenes on the VCD. He also had no knowledge of how the contents of the video cassette tape which he had used to record these scenes had been transferred onto a VCD for mass distribution. He did not in fact know where the original video cassette tapes were.

The Evidence Of Rafidah Binti Khalid, SD2 ('SD2') – Rizal's Wife

[31] SD2, Rizal's wife testified that she married him in 1996. They had initially stayed with her parents and in January 1998 moved into rented premises in Taman Sri Banang, Taman Sri Andalas with Rizal until September 1999. They moved back to her parents' house at that stage as she was expecting her first child by then.

[32] SD2 confirmed that Rizal had possessed a handy camera which he was used frequently. She stated that she knew and consented to his recording scenes of sexual intercourse between them, after Rizal had explained that it was purely for his personal possession. SD2 also identified the various scenes involving her and Rizal.

[33] Significantly, SD2 testified that she had been in charge of packing up their belongings and moving back to her parents' home. She also hired transport for the move and was assisted by the driver of the vehicle and his two assistants with the packing.

She instructed them to throw away some belongings and to pack the rest. In the middle room of the upper floor there were old video tapes stacked, which she instructed the packers to throw away. According to SD2, when she checked with Rizal prior to the move, he had instructed that old tapes be thrown away.

The Judgment Of The Sessions Court

[34] In her grounds of judgment the learned judge first considers the case for the prosecution. She sets out in summary the evidence of SP1 and goes on to explain how video compact discs containing the aforesaid scenes of SP1 and Rizal were found for sale in night markets. The learned judge then states that at the close of the prosecution case she found that the prosecution had made out a *prima facie* case against the accused in respect of the first alternative charge preferred against him and ordered him to enter his defence.

She then undertook a maximal evaluation of the evidence put forward by the defence before concluding that Rizal was guilty of the charge preferred against him under s. 292(a) of the Penal Code. Her reasons are as follows:

(i) The issue of how the video cassette tape recordings were converted into video compact disc form was a matter peculiarly within the knowledge of Rizal;

(ii) Rizal was the main 'actor' who had participated in the scenes with SP1 and his wife, SD2; this was not disputed;

(iii) Although there is no direct evidence that shows that Rizal was the one who made or produced the video compact disc, as the handy camera only contained a video cassette tape, the scenes on the video tape recording however made it clear that Rizal was the one who recorded and directed the various 'shots' taken of himself with SP1 and his wife,

(iv) The learned judge rejected Rizal's and SD2's evidence relating to the loss of the two video cassette recordings marked 'Brisbane' and 'Wife', concluding that as he had recorded these scenes for 'personal viewing' he would have kept them safely stored;

(v) Rizal's failure to report the loss of these tapes to the police or to take any steps to recover them lent further weight to this conclusion;

(vi) The court was satisfied that the sex scenes in the subject VCD were obscene;

(vii) The court was also satisfied that this obscene VCD was freely available for purchase by the public, based on the evidence of SP6 who confirmed that he had sold twenty VCDs.

Grounds Of Appeal

[35] Counsel for Rizal raised several grounds of appeal which can be summarized as follows:

(i) The learned judge erred in finding that the prosecution had made out a *prima facie* case, when in fact they had failed to do so;

(ii) The learned judge failed to consider that there was no evidence that showed that Rizal had made or produced the VCD in question;

(iii) The prosecution had failed to show that Rizal knew or possessed the requisite arid specialized equipment to make or produce the video compact disc in question and the court ought not to have presumed that this was within his knowledge;

(iv) The learned judge failed to consider that all the prosecution witnesses confirmed that Rizal could not be involved in the sale or offer of sale or distribution of the subject VCDs, as a consequence of which the element of 'distribution' was not made out;

(v) The learned judge failed to consider that there was no evidence adduced to show who had made the video compact disc from the video cassette recording; who had produced the front page or cover of the video compact disc; who had printed the VCD; who had edited the VCD and added in the obscene portions of the VCD with unknown actors; and who had put in the sound, music and words appearing on the VCD.

(vi) The learned judge had failed to draw an adverse inference under s. 114(g) of the Evidence Act against the prosecution for failing to call 'Gemuk' who was allegedly the source from whom SP6 procured supplies of the VCD for sale to the public; There was no connection shown between Rizal and 'Gemuk'.

(vii) The learned judge had failed to use *PP v. Mat* [1963] 1 LNS 82 when evaluating the defence case;

The Appeal

Grounds (i), (ii), (iii), (iv), (v) And (vi): Was A Prima Facie Case Made Out At The Close Of The Prosecution's Case?

[36] The first six grounds relate to proof of a *prima facie* case, whereby all the ingredients of the offence need to be made out. Rizal through his counsel contends through these grounds that a *prima facie* case was not made out. An examination of these grounds therefore requires consideration of whether the ingredients necessary to support the charge under s. 292(a) Penal Code were indeed made out at the close of the prosecution's case against Rizal.

[37] The ingredients of the charge that have to be proved in order to make out a *prima facie* case against Rizal under s. 292(a) of the Penal Code are as follows:

(a) That he, for the purposes of distribution or circulation;

(b) Made or produced;

(c) An object;

(d) Which object is obscene.

[38] In the context of the charge preferred against Rizal it was incumbent upon the prosecution to prove that:

(a) Between the beginning of 1999 and May 2003,

(b) At No. 12, Jalan Sri Banang, Taman Sri Andalas, Klang;

(c) Rizal made or produced, for the purposes of distribution or circulation to the public;

(d) A video compact disc;

(e) The contents of which are obscene

Element (a): … Between The Beginning Of 1999 And May 2003

[39] The evidence of SP1 bears out the fact that a video cassette tape recording of sexual scenes between Rizal and herself were made in the year 1999 at various places. However during the

prosecution case, there was no evidence from either Rizal or his wife, SD2 from which it could be ascertained when the various scenes relating to Rizal and his wife, Rizal and two unknown girls or the scenes between unknown persons in unknown places were recorded. However from the fact that the subject video compact disc was discovered in 2003, it may be inferred that its contents were recorded prior to that date. To that extent this element is made out.

Elements (c) And (d): Rizal Made Or Produced, For The Purposes Of Distribution Or Circulation To The Public A Video Compact Disc

[40] It is not in dispute that there is no direct evidence to show that Rizal made or produced the subject video compact disc (VCD). The evidence adduced by the prosecution showed that Rizal had made, ie, recorded and participated directly in several scenes which were recorded on a video cassette tape using a video handycam, which he operated with a remote control. There was no evidence adduced to show that Rizal had transferred the contents of the video cassette tape of himself and SP1 onto a video compact disc. Neither was any evidence adduced to show that Rizal had recorded the rest of the scenes on the video compact disc, nor that he had transferred those contents from any other video cassette recorder. It will be recalled that the contents of the subject video compact disc contained scenes not only of Rizal and SP1, but also of Rizal and other women, as well as sexual acts between unknown persons.

[41] The evidence that was adduced through SP11, the expert, was to explain how the contents of a video cassette tape could be transferred to a video compact disc. No evidence was produced to show that Rizal did at any time before 2003 transfer the contents of his two tape cassette recordings onto a video compact disc. Neither was there any evidence adduced to show that he had possession of, or utilized the requisite specialized equipment to effect such a transfer.

[42] On this subject as set out above, the learned judge concluded that the manner in which such a transfer was affected was peculiarly within Rizal's knowledge. Section 106 of the Evidence Act 1950 provides that 'Where any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.' This section applies where the prosecution has difficulties in proving a fact which would be relatively easy for the

accused to do. In such an instance the burden of proving that particular fact lies on the accused. In the instant case it cannot be said that the manner in which the contents of the two video cassette tapes were transferred to the video compact disc is a matter solely within Rizal's knowledge which is difficult for the prosecution to prove. From the evidence of SP11 it is evident that specific equipment is required in order to do so, and it would therefore not be difficult to ascertain whether or not Rizal had such equipment or had used such equipment, in the course of establishing a *prima facie* case. Section 106 is inapplicable for the purposes of establishing that Rizal transferred the contents of the cassette tapes onto a video compact disc. It is a matter which has to be established by direct evidence or by matter of inference.

[43] In the course of submissions during the appeal, Encik Roslan Din Hj. Abu Bakar for the respondent did in fact submit that the fact of transference from the video cassette tape to a video compact disc could be inferred from the totality of the facts set out above. It was in essence contended that as stated by SP11 it is not difficult to transfer the contents of a tape cassette onto a VCD and therefore the reasonable and in fact only irrefutable inference that could be drawn is that Rizal was the one responsible for the transference of the obscene material which appears on the VCD.

This proposition does not appear to be tenable for the following reasons:

(a) The transfer of the contents of the two cassette tapes onto the VCD comprises a series of sequential and salient facts which have to be established by the prosecution, either with direct evidence or with circumstantial evidence such as the presence or possession of the requisite equipment which would form the basis for an inference to be made. An inference cannot be drawn where there is simply no evidence. Therefore to leave a lacuna or gap where the prosecution should have adduced some evidence from which such an inference may be made, results in a salient fact in the sequence of events being left unproven. This gap cannot be filled with the use of s. 106 of the Evidence Act 1950 or by stipulating that the fact of transference may be inferred. In order for any such transference to be inferred, there should be a factual matrix from which such an inference can be made. In the instant case, no such factual matrix is available;

(b) The contents of the VCD differ considerably from that of the two cassette tapes as outlined above. The contents of the VCD contained additional material with unknown actors, and the material from the cassette tape recorders had been substantially edited and transferred in reverse order onto the VCD. These glaring discrepancies were not explained at all in the course of the prosecution case.

[44] Finally if it could not be proved that Rizal made or produced the VCD in question, then it follows that it cannot be proved that he did so for the purposes of distribution to the public. Elements (c) and (d) are not, to my mind, made out.

Element (e): The Contents Of The VCD Are Obscene

[45] It is evident that the learned judge considered that the contents of the VCD were obscene. It comprised pornography which did not fall within the purview of the exception to s. 292(a) which provides that objects of artistic value or religious content are not caught by the section. This element is not disputed by the defence. The contents of the VCD are obscene.

Element (b): The Production Of The VCD Was Carried Out By Rizal At His Rented Premises In No. 12, Jalan Sri Banang, Taman Sri Andalas, Klang

[46] Again there was simply no evidence adduced to show that the VCD was produced at these premises. In fact the relevance of this address is that it was the place where Rizal stayed with his wife between January 1998 and September 1999. The contents of the tape cassette recordings were produced during this period. The only connection between the tape cassette recordings and the premises were that one of the scenes on the tapes had been 'shot' at this address, and the two cassettes, 'Brisbane' and 'Wife' were stored in a room on these premises. Therefore the allegation that the subject VCD was produced at this address was not made out on the evidence adduced during the prosecution case.

The Failure To Consider The Lack Of Production Of The Witness Called 'Gemuk' And The Lack Of Connection Between 'Gemuk' And Rizal

[47] For the purposes of establishing that the VCD was produced for distribution to the public, the prosecution called SP6, a vendor in a night market, who explained in turn that he obtained supplies of the VCD in question from a man simply known as 'Gemuk'.

This said 'Gemuk' was never called as a witness; in fact his real name is not on the record. No nexus was shown between SP6 and Rizal or between the said 'Gemuk' and Rizal. In short there was nothing to link Rizal to the supply of the VCDs in the night market. However, this fact is necessary to show that Rizal produced the VCD for distribution to the public. In the absence of 'Gemuk' it is not possible to ascertain how the VCDs came to be produced for distribution to the public. In the further absence of any link between Rizal and either 'Gemuk' or SP6, there is, in like manner no link between the VCD sold in the market and Rizal, save that he is an actor in the film.

[48] From the foregoing it is evident that salient parts of the charge, comprising several integral elements, namely that Rizal made or produced the subject VCD for the purposes of distribution to the public have not been made out. The learned judge in her judgment does not appear to have appraised the evidence with a view to establishing whether or not the requisite elements of the offence were made out. As stated above, having set out SP1's evidence, and the fact that VCDs were available for purchase in the market, it was concluded that a *prima facie* case had been established. It does not appear from the grounds of judgment that the evidence adduced by the prosecution was subjected to a maximum evaluation as is required by law. (see *Looi Kow Chai v. PP* [2003] 1 CLJ 734; *Balachandran v. PP* [2005] 1 CLJ 85). In the instant case, the failure to subject the evidence to a thorough evaluation takes the form of failing to assess or ascertain that all the ingredients of an offence under s. 292(a) of the Penal Code were made out on the evidence adduced during the prosecution case. As this was not done, the conclusion that a *prima facie* case was made out is flawed. The failure to comply with this fundamental requirement has occasioned a miscarriage of justice.

By reason of the foregoing it is apparent that grounds (i)-(vi) of the grounds of appeal (as set out in para 3.1 above) are made out, and that on the basis of the evidence adduced during the course of the prosecution case, a *prima facie* case was not made out. Accordingly the appeal succeeds on these grounds alone. Notwithstanding this, the other grounds of appeal require consideration.

A **Grounds (vii): The Learned Judge Had Failed To Use *Mat v. PP* [1963] 1 LNS 82 When Evaluating The Defence Case**

[49] The grounds of judgment will show that while a thorough examination and evaluation of the prosecution's case was not
B carried out, a thorough and comprehensive review was instead conducted on the defence. The effect of failing to maximally evaluate the prosecution's case, but to subject the defence to a full and thorough examination is to reverse the burden of proof. Such a reversal of the burden of proof amounts to a substantive
C flaw resulting in a miscarriage of justice. The requirement in law that a maximal evaluation be carried out at the close of the prosecution's case is not mere incantation but requires rigorous application. It cannot be achieved by calling for the defence at the close of the prosecution case without having first ascertained that
D the offence has in fact been fully made out to a high degree of certainty, such that, the court would have no hesitation in convicting the accused at the close of the defence case should he choose to remain silent.

E **The Failure To Apply The Test In *Mat v. PP* [1963] 1 LNS 82**

[50] The learned judge having conducted a comprehensive evaluation of the defence case, rejected the defence put forward on the grounds that she did not believe the defence version of
F events, namely that the two video cassette tapes were lost during the course of the move from the rented premises in Jalan Sri Banang to Rizal's in-laws' house. The learned judge explained that she thought such an excuse was implausible. However there is nothing on the record to show that she took the further step of
G ascertaining whether or not Rizal's defence raised a 'credible' doubt. In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 Mohd. Azmi SCJ described the application of the test in *Mat v. PP* [1963] 1 LNS 82 thus:

H > ... We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be
I > believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is

satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. To satisfy this test it is not so much the words used by the Judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found the learned trial Judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to case reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.

[51] Here too there is no indication that the learned judge considered whether or not the evidence and the explanation given by Rizal raised a credible or reasonable doubt on the prosecution case. The failure to do so amounts to an error in law. Further an objective evaluation of the defence shows that it does raise a 'credible doubt' on the prosecution's case, because it is entirely plausible that the subject video cassette tapes were lost during the course of the move from Rizal's rented premises, arid that the contents of those two cassette tapes were edited and further material was added to it to comprise the subject matter of the obscene VCD that was sold to the public in 2003.

Conclusion

[52] If it had been considered whether a *prima facie* case had been made out on the evidence adduced during the course of the prosecution case, and if the requisite law had been applied to the defence case, it is unlikely that the burden of proof would have been reversed and that a decision to convict Rizal would have been reached. In these circumstances the conviction of the appellant appears to have been occasioned by a failure of justice, warranting interference at the appellate level. In so concluding I have borne in mind the principle that an appellate court should be slow to interfere with the finding of fact by a lower court as it does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. However in the instant case, the basic ingredients of an offence under s. 292(a) of the Penal Code were not made out. The prosecution witnesses themselves failed to draw a link between the subject obscene VCD and Rizal. Having considered all the circumstances of the case, it is my view that the finding of guilt and the conviction of the accused by the learned trial judge was wrong. This appeal is therefore allowed, and I set aside the conviction and sentence passed by the court below and acquit and discharge the accused.